Maju Holdings Sdn Bhd v Perwaja Terengganu Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(W)-1439–08 OF 2019
NOR BEE ARIFFIN, AZIZAH NAWAWI AND LEE HENG CHEONG JJCA
20 DECEMBER 2022

Contract — Agreement — Share sale agreement — Appellant failed to pay sum of outstanding and due payable under share sale agreement — Respondent filed action against appellant claiming sum of RM197,990,000 — Appellant filed and pleaded right of set off amounting to RM191,300,000 against respondent's claim — Whether appellant was entitled to set off against respondent's claim — Contracts Act 1950 ss 70 & 71

The respondent ('plaintiff') was a locally incorporated company and its shareholders were Tabung Amanah Warisan Negeri Terengganu and the Government of Malaysia, through the Ministry of Finance. The plaintiff was previously the holding company of a group of companies known as the Perwaja Group of companies ('PGC') which was in the steel industry. In the mid-nineties, the privatisation of PGC was initiated and the appellant ('defendant') participated in such privatisation. The privatisation of PGC involved the incorporation and participation of a special purpose corporate vehicle known as Equal Concept Sdn Bhd ('ECSB'). The defendant owned 51% of the issued share capital of ECSB, while the balance 49% was owned by the Malaysian Ministry of Finance. The plaintiff first entered into a written agreement with ECSB entitled 'Perwaja Group Share Sale Agreement' ('PGSSA'). The PGSSA provided for the sale by the plaintiff of all its shares in its subsidiaries to ECSB. In consideration, ECSB was to allot to the plaintiff ordinary shares in ECSB. At the same time, the plaintiff entered into another written agreement with the defendant described as the Equal Concept Share Sale Agreement ('ECSSA'). Under the ECSSA, the plaintiff was to sell its shares in ECSB to the defendant for a total consideration of RM1.02 billion. Pending the finalisation and completion of the privatisation, management agreements were executed whereby the plaintiff appointed ECSB and the defendant to provide the necessary management operational and business expertise to the plaintiff and its subsidiaries. The management agreements executed were: (a) between the plaintiff and ECSB dated 12 July 1996 ('the first management agreement'); (b) between the plaintiff and ECSB dated 31 December 1996 ('the second management agreement'); (c) between the plaintiff and the defendant dated 19 January 2001 ('the third management agreement'); and (d) between the plaintiff and the defendant ('the fourth management agreement') but it was never signed by the parties. At the same time, the

plaintiff and the defendant entered into the Equal Concept Share Sale Supplemental Agreement ('ECSSA supplemental agreement') where one of the terms resulted in an increase in the total consideration under the ECSSA to RM1.305b. The ECSSA supplemental agreement also amended cl 5 of the ECSSA which provided inter alia for what was described as a 'progressive cash consideration' payable by the defendant to the plaintiff by way of 111 monthly instalments of RM4m each and the 112 and final instalment being for an amount of RM6m. The plaintiff surrendered to the defendant, its shares in ECSB which were allotted to the plaintiff pursuant to the PGSSA, whereupon the defendant became the registered proprietor of 2,000,000,000 units of ordinary shares in ECSB. The plaintiff gave notice to the defendant that there was a total sum of RM198m outstanding and due in respect of the 'progressive cash consideration' payable under the ECSSA supplemental agreement. The defendant failed and/or omitted to pay and the plaintiff issued a notice of termination to terminate the ECSSA and the ECSSA supplemental agreement. As a result of the the defendant's failure to pay the sum as demanded, the plaintiff commenced a suit ('Suit 417') against the defendant but was withdrawn with liberty to file afresh and upon an undertaking that limitation under the Limitation Act 1953 would not be invoked. As part of the terms of the withdrawal of Suit 417, the defendant made a payment to the plaintiff of a sum of RM10,000. However, parties failed to reach a settlement, hence this action by the plaintiff against the defendant claiming the sum of RM197,990,000. In response, the defendant filed and pleaded a right of set off amounting to RM191,300,000 ('the amount of set off') against the plaintiff's claim. The learned High Court judge found and entered judgment for the plaintiff against the defendant. Hence, this appeal by the defendant.

Held, dismissing the appeal with costs of RM20,000:

(1) Clause 5 of the third and fourth management agreements was a 'best endeavour' clause which did not impose an absolute and unconditional contractual obligation on a contracting party. However, it was still a contractual obligation, that the defendant had to comply with even though it was not an absolute one. Thus, the defendant could not avail itself to an equitable set off. The amount of set off were provided pursuant to a contractual obligation and thus, they were not provided gratuitously. To allow the defendant to set off the amount of set off, in effect, to allow for the recovery of monies required to be paid under a contract that made no provision for their recovery and without any breach on the part of the plaintiff, merely on the ground that the payment was not intended to be gratuitous. If the payments were required to be made under the said cl 5, they could not be recoverable under s 71 of the Contracts Act 1950, on the basis that the payments were not meant to be gratuitous. In addition, the amount of set off were to be loans to the PGC's subsidiaries and not to the plaintiff. Thus, they were not

recoverable against the plaintiff. The third and fourth management agreements also did not provide for their repayment unlike the first and second management agreements. The defendant's set off of the said amount of set off was unsustainable (see paras 39–40, 46–57, 50–52 & 57).

(2) The component that the plaintiff must first be under a legal obligation to pay or provide for the working capital of the subsidiaries, which was essential to the applicability of s 70 of the Contracts Act 1950, was not present. Therefore, reliance on s 70 of the Contracts Act 1950 may not be placed by the defendant for its claimed set off. In relation to s 71 of the Contracts Act 1950, whilst the payments provided by the defendant were lawful, the said amount of set off could not be said to be monies provided for the benefit of the plaintiff. The monies were actually provided for the use of the subsidiaries which were separate legal entities and were not the plaintiff. Thus, if the defendant wished to look for repayment of the said amount of set off, it would have to look to the subsidiaries and not the plaintiff. There was no appealable error in the learned judge's finding that the defendant could not rely on ss 70 and 71 of the Contracts Act 1950 to claim a set off. There was no appealable error in the learned High Court judge's finding of fact and in law that the defendant's right of set off was unsustainable. The obligation to refund the working capital was only an arrangement between the defendant and ECSB and specific to the period for the first and second management agreements whereas the defendant's obligation to provide the working capital was a contractual obligation under the third and fourth management agreements (see paras 61 & 66–68).

[Bahasa Malaysia summary

Responden ('plaintif') adalah sebuah syarikat yang diperbadankan di Malaysia dan pemegang sahamnya ialah Tabung Amanah Warisan Negeri Terengganu dan Kerajaan Malaysia, melalui Kementerian Kewangan. Plaintif sebelum ini merupakan syarikat induk kepada kumpulan syarikat yang dikenali sebagai Kumpulan Syarikat Perwaja ('PGC') yang berada dalam industri keluli. Pada pertengahan tahun sembilan puluhan, penswastaan PGC telah dimulakan dan perayu ('defendan') mengambil bahagian dalam penswastaan tersebut. Penswastaan PGC melibatkan pemerbadanan dan penyertaan syarikat korporat tujuan khas yang dikenali sebagai Equal Concept Sdn Bhd ('ECSB'). Defendan memiliki 51% daripada modal saham terbitan ECSB, manakala baki 49% dimiliki oleh Kementerian Kewangan Malaysia. Plaintif mula-mula memeterai perjanjian bertulis dengan ECSB bertajuk 'Perwaja Group Share Sale Agreement' ('PGSSA'). PGSSA menyediakan untuk penjualan oleh plaintif semua sahamnya dalam anak syarikatnya kepada ECSB. Sebagai balasan, ECSB hendaklah memperuntukkan kepada plaintif saham biasa dalam ECSB. Pada masa yang sama, plaintif memeterai satu lagi perjanjian

bertulis dengan defendan yang disifatkan sebagai Equal Concept Share Sale Agreement ('ECSSA'). Di bawah ECSSA, plaintif hendaklah menjual sahamnya dalam ECSB kepada defendan dengan jumlah balasan RM1.02 bilion. Sementara menunggu penyempurnaan dan penyelesaian penswastaan, perjanjian pengurusan telah dilaksanakan di mana plaintif melantik ECSB dan defendan untuk menyediakan kepakaran operasi pengurusan dan perniagaan yang diperlukan kepada plaintif dan anak syarikatnya. Perjanjian pengurusan yang dilaksanakan adalah: (a) antara plaintif dan ECSB bertarikh 12 Julai 1996 ('perjanjian pengurusan pertama'); (b) antara plaintif dan ECSB bertarikh 31 Disember 1996 ('perjanjian pengurusan kedua'); (c) antara plaintif dan defendan bertarikh 19 Januari 2001 ('perjanjian pengurusan ketiga'); dan (d) antara plaintif dan defendan ('perjanjian pengurusan keempat') tetapi ia tidak pernah ditandatangani oleh pihak-pihak. Pada masa yang sama, plaintif dan defendan telah menandatangani Equal Concept Share Sale Supplemental Agreement ('perjanjian tambahan ECSSA') di mana salah satu daripada terma mengakibatkan peningkatan balasan di bawah ECSSA kepada RM1.305b. Perjanjian tambahan ECSSA juga meminda klausa 5 ECSSA yang memperuntukkan antara lain untuk apa yang disifatkan sebagai 'progressive cash consideration' yang perlu dibayar oleh defendan kepada plaintif melalui 111 ansuran bulanan sebanyak RM4 juta setiap satu dan 112 dan ansuran akhir adalah untuk jumlah RM6 juta. Plaintif menyerahkan kepada defendan, sahamnya dalam ECSB yang diperuntukkan kepada plaintif menurut PGSSA, di mana defendan menjadi pemilik berdaftar 2,000,000,000 unit saham biasa dalam ECSB. Plaintif memberi notis kepada defendan bahawa terdapat sejumlah RM198 juta tertunggak dan perlu dibayar berkenaan dengan 'progressive cash consideration' yang perlu dibayar di bawah perjanjian tambahan ECSSA. Defendan gagal dan/atau tidak membayar dan plaintif mengeluarkan notis penamatan untuk menamatkan ECSSA dan perjanjian tambahan ECSSA. Akibat daripada kegagalan defendan untuk membayar jumlah seperti yang dituntut, plaintif memulakan guaman ('Guaman 417') terhadap defendan tetapi telah ditarik balik dengan kebebasan untuk memfailkan semula dan atas akujanji bahawa had masa di bawah Akta Had Masa 1953 tidak akan dibangkitkan. Sebagai sebahagian daripada syarat penarikan Guaman 417, defendan membuat pembayaran kepada plaintif sejumlah RM10,000. Bagaimanapun, pihak-pihak gagal mencapai penyelesaian, justeru tindakan plaintif terhadap defendan yang menuntut sejumlah RM197,990,000. Sebagai balasan, defendan memfailkan dan merayu hak tolakan berjumlah RM191,300,000 ('jumlah tolakan') terhadap tuntutan plaintif. Hakim Mahkamah Tinggi yang bijaksana mendapati dan memasukkan penghakiman untuk plaintif terhadap defendan. Oleh itu, rayuan ini oleh defendan.

Diputuskan, menolak rayuan dengan kos RM20,000:

(1) Klausa 5 perjanjian pengurusan ketiga dan keempat ialah klausa 'usaha

terbaik' yang tidak mengenakan kewajipan kontrak mutlak dan tanpa syarat kepada pihak yang berkontrak. Walau bagaimanapun, ia masih menjadi kewajipan kontrak, yang perlu dipatuhi oleh defendan walaupun ia bukan tanggungjawab mutlak. Oleh itu, defendan tidak boleh menggunakan tolakan ekuiti. Jumlah tolakan telah disediakan menurut kewajipan kontrak dan oleh itu, ia tidak diberikan secara percuma. Untuk membenarkan defendan menolak amaun tolakan, akan menyebabkan, untuk membenarkan pemulihan wang yang perlu dibayar di bawah kontrak yang tidak membuat peruntukan bagi pemulihan mereka dan tanpa sebarang pelanggaran di pihak plaintif, semata-mata atas alasan bahawa bayaran itu tidak bertujuan untuk percuma. Jika bayaran perlu dibuat di bawah klausa 5 tersebut, ia tidak boleh diperolehi semula di bawah s 71 Akta Kontrak 1950, atas dasar bahawa bayaran itu tidak dimaksudkan sebagai percuma. Di samping itu, jumlah tolakan adalah sebagai pinjaman kepada anak syarikat PGC dan bukan kepada plaintif. Oleh itu, mereka tidak boleh dipulihkan terhadap plaintif. Perjanjian pengurusan ketiga dan keempat juga tidak memperuntukkan pembayaran balik mereka tidak seperti perjanjian pengurusan pertama dan kedua. Tolakan defendan terhadap jumlah tolakan tersebut adalah tidak dapat dipertahankan (lihat perenggan 39–40, 46–57, 50–52 & 57).

(2) Komponen yang plaintif mesti terlebih dahulu berada di bawah kewajipan undang-undang untuk membayar atau menyediakan modal kerja anak-anak syarikat, yang penting untuk kebolehgunaan s 70 Akta Kontrak 1950, adalah tiada. Oleh itu, pergantungan kepada s 70 Akta Kontrak 1950 tidak boleh diletakkan oleh defendan untuk tolakan yang dituntut. Berhubung dengan s 71 Akta Kontrak 1950, walaupun bayaran yang diberikan oleh defendan adalah sah, jumlah tolakan tersebut tidak boleh dikatakan sebagai wang yang disediakan untuk kepentingan plaintif. Wang itu sebenarnya disediakan untuk kegunaan anak-anak syarikat yang merupakan entiti undang-undang yang berasingan dan bukan plaintif. Oleh itu, jika defendan ingin memohon pembayaran balik jumlah tolakan tersebut, ia perlu memohon kepada anak syarikat dan bukannya plaintif. Tiada kesilapan boleh dirayu dalam dapatan hakim yang bijaksana bahawa defendan tidak boleh bergantung pada ss 70 dan 71 Akta Kontrak 1950 untuk menuntut tolakan. Tiada kesilapan boleh dirayu dalam penemuan fakta dan undang-undang hakim Mahkamah Tinggi yang bijaksana bahawa hak defendan untuk menolak adalah tidak dapat dipertahankan. Kewajipan untuk memulangkan modal kerja hanyalah perkiraan antara defendan dan ECSB dan khusus untuk tempoh perjanjian pengurusan pertama dan kedua manakala kewajipan defendan untuk menyediakan modal kerja adalah obligasi kontrak di bawah perjanjian pengurusan ketiga dan keempat (lihat perenggan 61 & 66–68).]

Cases referred to

Electricity Generation Corp v Woodside Energy Ltd; Woodside Energy Ltd v Electricity Generation Corp (2014) 306 ALR 25, HC (folld)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)
New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd New Hebrides (in liquidation) [1987] 2 MLJ 57, SC (distd)
Newacres Sdn Bhd v Sri Alam Sdn Bhd [2000] 2 MLJ 353, FC (refd)
Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (folld)
PR SP Periakaruppan Chettiar v Yong Book Fong [1972] 1 MLJ 160, FC (refd)
Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd [1985] 1 MLJ 157, FC (refd)
Shanghai Hall Ltd v Town House Hotel Ltd [1967] 1 MLJ 223, FC (refd)
Siow Wong Fatt v Susur Rotan Mining Ltd & Anor [1967] 2 MLJ 118; [1967] 1 LNS 161, PC (refd)

Legislation referred to

Contracts Act 1950 ss 70, 71
Limitation Act 1953

Appeal from: *Perwaja Terengganu Sdn Bhd v Maju Holdings Sdn Bhd* [2019] MLJU 728 (High Court, Kuala Lumpur)

Bastian Vendargon (with Alliff Benjamin Suhaimi and Anne Vendargon) (Thomas Phillip) for the appellant.
Mohd Zein Md Tajuddin (with Asha Anandan) (Md Tajuddin & Co) for the respondent.

Lee Heng Cheong JCA:

BACKGROUND

[1] The respondent/plaintiff is a locally incorporated company and its shareholders are Tabung Amanah Warisan Negeri Terengganu and the Government of Malaysia, through the Ministry of Finance.

[2] The respondent/plaintiff was previously the holding company of a group of companies known as the Perwaja Group of Companies ('PGC') which was in the steel industry.

[3] In the mid-nineties, the privatisation of PGC was initiated and the

appellant/defendant participated in such privatisation.

[4] The privatisation of PGC involved the incorporation and participation of a special purpose corporate vehicle known as Equal Concept Sdn Bhd ('ECSB'). The appellant/defendant owned 51% of the issued share capital of ECSB, while the balance 49% was owned by the Malaysian Ministry of Finance.

[5] The respondent/plaintiff first entered into a written agreement with ECSB entitled 'Perwaja Group Share Sale Agreement', dated 16 May 1997 ('PGSSA').

[6] The PGSSA provided for the sale by the respondent/plaintiff of all its shares in its subsidiaries listed in Schedule 2 thereto, to ECSB. There were 20 companies listed in Schedule 2. In consideration, ECSB was to allot to the respondent/plaintiff, two billion fully paid up ordinary shares of RM1 each in ECSB and one unit of 'Class A' fully paid up ordinary share in ECSB with special rights attached as per Schedule 6 of the PGSSA.

[7] At the same time, the respondent/plaintiff entered into another written agreement with the appellant/defendant described as the Equal Concept Share Sale Agreement which was also dated 16 May 1997 ('ECSSA').

[8] Under the ECSSA, the respondent/plaintiff was to sell its shares in ECSB to the appellant/defendant for a total consideration of RM1.02 billion.

[9] Subsequently, the respondent/plaintiff and ECSB entered into a written agreement described as the Perwaja Group share sale supplemental agreement dated 18 November 2002 ('PGSSA supplemental agreement'). The PGSSA supplemental agreement provided for certain amendments to be made to the PGSSA, among which was the reduction of the number of companies listed in Schedule 2 of the PGSSA from 20 to 18 (collectively the 'subsidiaries').

THE MANAGEMENT AGREEMENTS

[10] Pending the finalisation and completion of the privatisation, the following management agreements were executed whereby the respondent/plaintiff appointed ECSB and the appellant/defendant to provide the necessary management operational and business expertise to the respondent/plaintiff and its subsidiaries.

[11] There were three management agreements executed by the respondent/plaintiff namely:

A (a) a management agreement between the respondent/plaintiff and ECSB dated 12 June 1996 ('first management agreement');

(b) a management agreement entered into between the respondent/plaintiff and ECSB dated 31 December 1996 ('second management agreement'; and

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(c) a management agreement entered into between the respondent/plaintiff and the appellant/defendant dated 19 January 2001 ('third management agreement').

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[12] There was also a fourth management agreement made between the respondent/plaintiff and the appellant/defendant ('fourth management agreement'). However, this fourth management agreement was never signed by the parties, namely, the respondent/plaintiff and the appellant/defendant.

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[13] Under the third and fourth management agreements, the purpose of the appellant's/defendant's appointment was set out under cl 2.1 which stated as follows:

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2.1 Appointment

Perwaja (in its own capacity and as the holding company and for and on behalf of the Group) appoints *Maju to provide the services described in Schedule 1 (the 'Services') through their participation in the EXCO in respect of the day to day business and affairs of the Group*, and Maju Accepts such appointment, on the terms and subject to the conditions set out in this Agreement. (Emphasis added.)

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Schedule 1 of the third and fourth management agreements provided as follows:

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SCHEDULE 1

The Services

The services to be undertaken by Maju are as follows:

(1) To provide the necessary management operational and business expertise to the Group.

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(2) With the authorisation or consent of the Board to form the EXCO.

(3) To engage or set up a management team consisting of qualified personnel to effectively implement the obligations of Maju under this Agreement.

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(4) To provide for any other services as directed by the Board.

[14] The effective date of the third management agreement was on 1 January 1998 whilst the effective date of the fourth management agreement was on 1 January 2002.

[15] At the same time, the respondent/plaintiff and the appellant/defendant entered into the Equal Concept share sale supplemental agreement which was similarly dated 18 November 2002 ('ECSSA supplemental agreement') which also provided for certain amendments to the ECSSA. A

[16] One of the terms of the ECSSA supplemental agreement was that the consideration to be paid by the appellant/defendant under the ECSSA was reduced. The appellant/defendant was however required to assume the respondent's/plaintiff's liability in ECSB upon the terms therein provided. This resulted in an increase in the total consideration under the ECSSA to RM1.305 billion inclusive of the liabilities assumed. B C

[17] The ECSSA supplemental agreement also amended cl 5 of the ECSSA. The amendment provided, inter alia, for what was described as a 'Progressive Cash Consideration' payable by the appellant/defendant to the respondent/plaintiff by way of 111 monthly instalments of RM4m each and the 112 and final instalment being for an amount of RM6m. D

[18] On 6 January 2003, the respondent/plaintiff surrendered to the appellant/defendant, its shares in ECSB which were allotted to the respondent/plaintiff pursuant to the PGSSA, whereupon the appellant/defendant became the registered proprietor of 2,000,000,000 units of ordinary shares in ECSB. E

[19] On 11 September 2014 the respondent/plaintiff gave notice to the appellant/defendant that there was a total sum of RM198m outstanding and due in respect of the 'Progressive Cash Consideration' payable under the ECSSA supplemental agreement. F

[20] Notwithstanding the respondent/plaintiff's demand, the appellant/defendant failed and/or omitted to pay the sum of RM198m. On 3 November 2014, the respondent/plaintiff issued a notice of termination to terminate the ECSSA and the ECSSA supplemental agreement. G

[21] As a result of the the appellant/defendant's failure to pay the sum as demanded, the respondent/plaintiff commenced Civil Suit No 22NCC-417–11 of 2014 ('Suit 417') against the appellant/defendant, claiming, inter alia, the said sum of RM198m. However, to facilitate an amicable settlement, Suit 417 was withdrawn with liberty to file afresh and upon an undertaking that limitation under the Limitation Act 1953 would not be invoked. As part of the terms of the withdrawal of Suit 417, the appellant/defendant made a payment to the respondent/plaintiff of a sum of RM10,000. However, parties failed to reach a settlement, hence this action by the respondent/plaintiff against the appellant/defendant claiming the sum of H I

RM197,990,000. In response, the appellant/defendant filed and pleaded a right of set off amounting to RM191,300,000 ('the said amount of set off') against the respondent/plaintiff's claim.

THE FINDINGS OF THE LEARNED HIGH COURT JUDGE

[22] At the end of the trial between the parties, the learned High Court judge found for the respondent/plaintiff and entered judgment for the respondent/plaintiff against the appellant/defendant in the sum of RM197,990,000 together with interest thereon from the date of issue of the writ of summons herein at the rate of 5%pa until the date of judgment, and interest on the judgment sum at the rate of 5%pa until the date of full realisation. Aggrieved by the learned High Court judge's decision, the appellant/defendant appealed to this court.

[23] The learned High Court judge found, inter alia, as follows:

(a) that the third and fourth management agreements, do not provide for the defendant's recoverability of the said amount of set off unlike the first and second management agreements;

(b) that it was not pleaded that the said amount of set off were loans and there was no reason to regard them as loans. Even if they were loans, they had to be loans to the subsidiaries and not to the plaintiff. Thus, they are not recoverable against the plaintiff;

(c) that, in providing the said amount of set off or financial assistance towards the working capital needs of the subsidiaries, the defendant was merely looking after the interests of companies that it was ultimately to own and control;

(d) that the plaintiff had not unjustly benefited from the said amount of set off made by the defendant on behalf of the Subsidiaries towards their working capital; and

(e) that ss 70 and 71 of the Contracts Act 1950 does not apply and that the defendant's set off was not made out.

[24] Parties shall be referred to, in their respective capacities before the High Court.

THE DEFENDANT'S CONTENTIONS

[25] Before us, the defendant, inter alia, contended as follows:

(a) that they have pleaded the said amount of set off as a set off against the plaintiff's claim, which were payments made by the defendant to PGC's subsidiaries;

(b) that it was entitled, in equity, to set off the said amount of set off against the plaintiff's claim because the said amount of set off was made up of monies that the defendant had expended as working capital for the subsidiaries;

(c) the defendant contended that the said amount of set off is working capital which it expended on behalf of PGC and was not meant to be gratuitous;

(d) that cl 5 of both the third and the fourth management agreements ('the said cl 5') merely imposed on the defendant, a 'best endeavour obligation' to provide fund for PGC and such a 'best endeavour obligation', does not impose a contractual obligation on a contracting party;

(e) that the said amount of set off was made in respect of working capital for the subsidiaries, were not meant to be gratuitous and that the plaintiff would be unjustly enriched if the said amount of set off were not to be recoverable by the defendant; and

(f) that the defendant also relied on ss 70 and 71 respectively of the Contracts Act 1950.

THE PLAINTIFF'S CONTENTIONS

[26] Before us, the plaintiff, inter alia, contended as follows:

(a) that the defendant's equitable defence of set off of the said amount of set off, cannot be used to assist the defendant to avoid its contractual obligation to provide working capital under the third and fourth management agreements;

(b) that the defendant's defence of set off is an afterthought in the light of the defendant's own letter dated 8 April 2010 to the plaintiff;

(c) that the fact that the defendant was to provide the working capital on a 'best endeavor basis' merely indicates that no minimum sum was fixed between the parties under the third and fourth management agreements and that the defendant is still liable to provide the working capital;

(d) that the working capital expended by the defendant during the transition period did not benefit the plaintiff but the PGC companies that were subsequently owned by the defendant; and

(e) that the defendant has failed to prove their defence of set off and failed to fulfil the elements under ss 70 and 71 of the Contracts Act 1950.

A OUR ANALYSIS

[27] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. In the case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 where the Court of Appeal held as follows:

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> ... an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. *But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.* (Emphasis added.)

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[28] Reference is also made to the decision of the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 where the Federal Court held that the test of 'insufficient judicial appreciation of evidence' adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence.

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[29] Bearing in mind the above principles distilled from the above cases, we will now deal with the defendant's appeal.

[30] In the supplementary agreed facts dated 10 May 2019, there was an admission of facts as between the parties that the outstanding instalment for the progressive cash consideration under the ECSSA supplemental agreement was RM197,990,000 and that the defendant had expended RM191,300,000 or the said amount of set off as working capital for PGC, with a reservation that the admission was in respect of the figures only, and the parties are still required to prove its case on liability for payment and right to set off.

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[31] It was undisputed that the expenditure of the said amount of set off overlapped the terms of both the third management agreement and the fourth management agreement.

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[32] It is also common ground that the said amount of set off was incurred pursuant to a common clause that was found in both the third and the fourth management agreements, namely, the said cl 5 and that the said amount of set off that were provided for the subsidiaries were provided pursuant to the said cl 5.

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[33] We are of the considered view that the core issue left for our determination is whether the defendant was entitled to set off the said amount

of set off amounting to RM191,300,000, against the plaintiff's claim of RM197,990,000.

RIGHT OF SET OFF

[34] In *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd* [1985] 1 MLJ 157 at p 160, Salleh Abas LP delivering the judgment of the Federal Court, explained:

> What is set off?
>
> A set off is a crossclaim for a sum of money by a defendant against a plaintiff's claim for another sum of money for which the defendant is being sued. A crossclaim is not necessarily a set off, merely because the word used in the pleading is 'set off'. Whether or not the plea is a set off it has to be determined as a matter of law and substance. *Hanak v Green* [1958] 2 QB 9, 26. A crossclaim which is accepted as a defence of set off has the effect of extinguishing either the whole or part of the plaintiffs claim. See *In re A Bankruptcy Notice* [1934] Ch 431, 437. But to constitute a set off the sum of money meant as a crossclaim must from its nature and quality be such that it is proper to be dealt with as a defence to the plaintiffs claim and not as a separate cause or matter.

[35] Salleh Abas LP in *Permodalan Plantations Sdn Bhd* held further:

> ..., there being no Malaysian Statutes comparable to the United Kingdom Statutes on the subject, we therefore hold that only equitable and not legal set off is part of our law, and consequently the court can only deal with an equitable set off.

[36] The Federal Court in *Shanghai Hall Ltd v Town House Hotel Ltd* [1967] 1 MLJ 223 at p 225, explained further on the right of set off where Raja Azlan Shah J (as his Royal Highness then was) stated:

> With regard to the word 'set off', Lord Hanworth MR in *Re A Judgment Debtor, Ex parte Judgment Creditor* [1934] All ER Rep 688 said:
>
> > That is a word well known and established in its meaning; it is something which provides a defence because the nature and quality of the sum so relied upon is a sum which is proper to be dealt with as diminishing the claim which is made, and against which the sum so demanded can be set off.

[37] In regard to equitable set offs, the defendant referred to the decision of the Federal Court case of *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [2000] 2 MLJ 353 at p 383, where Chong Siew Fai CJ (Sabah and Sarawak) stated:

> As to the sort of crossclaims that can be deducted by way of equitable set off, the following observations of Lord Denning in *Federal Commerce Ltd v Molena Alpha Inc* [1978] 1 QB 927 (CA) is enlightening. After dealing with abatement at common law, he said at pp 974–975:

> But the courts of equity, as was their wont, came in to mitigate the technicalities of the common law. *They allowed deductions — by way of equitable set off whenever there were good equitable grounds for directly impeaching the demand which the creditor was seeking to enforce*: see *Rawson v Samuel* (1841) Cr & Ph 161 at pp 178–179, per Lord Cottenham LC. These grounds were never precisely formulated before the Judicature Act 1873. It is now far too late to search through the old books and dig them out. Over 100 years have passed since the Judicature Act 1873. During that time the streams of common law and equity have flown together and combined so as to be indistinguishable the one from the other. We have no longer to ask ourselves: what would the courts of common law or the courts of equity have done before the Judicature Act? We have to ask ourselves: what should we do now so as to ensure fair dealing between the parties? See *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, per Lord Diplock. *This question must be asked in each case as it arises for decision: and then, from case to case, we shall build up a series of precedents to guide those who come after us. But one thing is quite clear: it is not every crossclaim which can be deducted. It is only crossclaims that arise out of the same transaction or are closely connected with it. And it is only crossclaims which go directly to impeach the plaintiffs demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the crossclaim*. (Emphasis added.)

CLAUSE 5 OF THE THIRD AND FOURTH MANAGEMENT AGREEMENTS

[38] The defendant contended that the said cl 5 of both the third and the fourth management agreements merely imposed on the defendant a 'best endeavour obligation' to provide fund for the PGC and such a 'best endeavour obligation', does not impose a contractual obligation on a contracting party.

[39] The defendant further contended that the said amount of set off was made in respect of working capital for the subsidiaries, were not meant to be gratuitous and that the plaintiff would be unjustly enriched if the said amount of set off were not to be recoverable by the defendant.

[40] We are of the considered view that the said cl 5 was a 'best endeavour' clause which does not impose an absolute and unconditional contractual obligation on a contracting party. Guidance can be found in the decision of the High Court of Australia of *Electricity Generation Corp v Woodside Energy Ltd; Woodside Energy Ltd v Electricity Generation Corp* (2014) 306 ALR 25 at p 35, where French CJ dealt with such a clause as follows:

> [40] Contractual obligations framed in terms of 'reasonable endeavours' or 'best endeavours (or efforts)' are familiar. Argument proceeded on the basis that substantially similar obligations are imposed by either expression. Such obligations are not uncommon in distribution agreements, intellectual property licences, mining and resources agreements and planning and construction contracts. Such

clauses are ordinarily inserted into commercial contracts between parties at arm's length who have their own independent business interests.

[41] *Three general observations can be made about obligations to use reasonable endeavours to achieve a contractual object. First, an obligation expressed thus is not an absolute or unconditional obligation. Second, the nature and extent of an obligation imposed in such terms is necessarily conditioned by what is reasonable in the circumstances, which can include circumstances that may affect an obliger's business.*

[42] As Sellers J observed of a corporate obliger in *Terrell*, an obligation to use reasonable endeavours would not oblige the achievement of a contractual object 'to the certain ruin of the company or to the utter disregard of the interests of the shareholders'. An obliger's freedom to act in its own business interests, in matters to which the agreement relates, is not necessarily foreclosed, or to be sacrificed, by an obligation to use reasonable endeavours to achieve a contractual object.

[43] *Third, some contracts containing an obligation to use or make reasonable endeavours to achieve a contractual object contain their own internal standard of what is reasonable, by some express reference relevant to the business interest of an obligor*. (Emphasis added.)

[41] We are in agreement with the learned High Court judge's finding although the said cl 5 was a 'best endeavour clause', it was however still a contractual obligation, that the defendant had to comply with even though it is not an absolute one. The defendant complied with this obligation, by utilising the funds established for that purpose under the Escrow Account Agreement 1, from account number 1408–1198224–05–5 with Bumiputra Commerce Bank. We will further elaborate on this, in our next paragraph. Thus, the defendant cannot avail itself to an equitable set off.

[42] There was, inter alia, an agreement for the management of the Escrow Account in Respect of Existing Construction Projects' dated 18 November 2002 ('Escrow Account Agreement 1') and were entered into among the Government of Malaysia, the plaintiff and the defendant.

[43] Clause 4.1 of the above Escrow Account Agreement 1 provides that:

4.1 The Parties agree that the Escrow Amount shall be utilised solely and exclusively for the working capital of the Perwaja Group of Companies.

[44] The Perwaja Group of Companies, which were listed in Schedule 2 of the Escrow Account Agreement 1, were the subsidiaries listed in Schedule 2 of the PGSSA supplemental agreement.

[45] DW1, Mr Yap Beng Him testified, and it was also common ground, that the total amount of the said amount of set off was expended under this Escrow Account, pursuant to the above Escrow Account Agreement 1, jointly

by the defendant and the Government of Malaysia. As such, these monies were the defendant's monies or monies due to the defendant from relevant Government agencies. In essence, the said amount of set off were monies expended as working capital for the subsidiaries and were monies that belonged to the defendant or monies that the defendant was entitled to.

[46] We noted that it was not pleaded by the defendant that the said amount of set off that it provided to the subsidiaries, as working capital, were in the form of loans. In addition, unlike the first and second management agreements, there was no provision for the repayment or recoverability of the payments towards working capital provided by the defendant. Thus, their recoverability if at all, would be dependent on the applicability of either ss 70 or 71 of the Contracts Act 1950.

[47] Our considered opinion is that the said amount of set off which were admittedly provided under the said cl 5 and paid out of the Bumiputra Commerce Bank account established under Escrow Account Agreement 1, were not provided gratuitously. Monies which were provided pursuant to the said cl 5, were provided pursuant to a contractual obligation and thus, they were not provided gratuitously.

[48] Further, we take the view that although the said cl 5 was on a best endeavour basis, the said cl 5 was nevertheless a contractual obligation that the defendant had to comply with and which it did. To allow the defendant to set off the said amount of set off, in effect, to allow for the recovery of monies required to be paid under a contract that makes no provision for their recovery and without any breach on the part of the plaintiff, merely on the ground that the payment was not intended to be gratuitous.

[49] The defendant contended that a payment may still be gratuitous notwithstanding it being an obligation under a contract. Reliance was placed on the decision of the Supreme Court in *New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd New Hebrides (in liquidation)* [1987] 2 MLJ 57. However, in this case, the learned High Court judge held that there was a loan and the money was thus recoverable as a loan. Further, it was also held that the conditions required for s 71 of the Contracts Act 1950 existed and thus s 71 was applicable. The decision of the High Court was upheld by the Supreme Court.

[50] However, the circumstances in *New Kok Ann Realty*'s case, is quite different from the present appeal. Unlike in *New Kok Ann Realty*'s case, the defendant in the present appeal was under a contractual obligation, even though not an absolute one, to provide the working capital of PGC.

[51] It is our considered view that if the payments were required to be made under the said cl 5, they cannot be recoverable under s 71 of the Contracts Act 1950, on the basis that the payments were not meant to be gratuitous. The payments were indeed not meant to be gratuitous as they were made pursuant to a contractual obligation. It was also in this context that it cannot be said that there was any unjust enrichment received by the plaintiff.

[52] In addition, we noted that in addition to the fact that it was not pleaded that the said amount of set off were loans and even if they were loans, they were to be loans to the PGC's subsidiaries and not to the plaintiff. Thus, they are not recoverable against the plaintiff. In the circumstances of this case, the payments on behalf of the PGC's subsidiaries were not meant to be recoverable.

[53] Whether the said amount of set off or monies paid would be recoverable would also then depends on whether the governing contract provided for their recoverability. The third and fourth management agreements, however, do not provide for their repayment unlike the first and second management agreements.

[54] At the time when the payments were provided by the defendant, there was already in place the ECSSA and the PGSSA pursuant to which the defendant would legally acquire the shares of ECSB and in turn, through ECSB, own the subsidiaries. In essence, when the defendant provided the working capital of the subsidiaries at the material time, the defendant was in fact looking after the companies that it was in the process of acquiring.

[55] Thus, by providing financial assistance in the form of the said amount of set off towards the working capital of the subsidiaries, the defendant was merely looking after the interests of companies that it was ultimately to own and control. The defendant was in fact looking after its own interest and not that of the plaintiff.

[56] Contrary to the defendant's contention, we are of the considered opinion that the plaintiff did not unjustly benefited from the payments made by the defendant on behalf of the subsidiaries towards their working capital. In any event, no claim in unjust enrichment was pleaded by the defendant.

[57] Having regard to the above, we are of the considered view that s 71 of the Contracts Act 1950 does not apply.

[58] Whilst the financing provisions in the first and second management agreements expressly provided for repayment of the working capital provided, the third and fourth management agreements however, do not contain any provision for the repayment of financing payments provided thereunder and

therefore any financing provided was not meant to be repayable to the defendant. Thus, we are of the considered view that the defendant's set off of the said amount of set off was unsustainable.

SECTIONS 70 AND 71 OF THE CONTRACTS ACT 1950

[59] In the course of settling up its right of set off, the defendant also relied on ss 70 and 71 respectively of the Contracts Act 1950. For ease of reference ss 70 and 71 of the Contracts Act 1950 are reproduced below as follows:

> 70 Reimbursement of person paying money due by another, in payment of which he is interested
>
> A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.
>
> ILLUSTRATION
>
> A, the owner of a holding situated within a Town Board area, allows the assessment due thereon to fall into arrear. The Chairman of the Town Board seizes movable property found on the holding with a view to its sale by public auction under the Town Boards Enactment [F. M. S. Cap. 137]. B having an interest in the movable property pays the arrear. A is bound to make good to B the amount so paid.
>
> 71 Obligation of person enjoying benefit of non-gratuitous act
>
> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.
>
> ILLUSTRATIONS
>
> (a) A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them.
>
> (b) A saves B's property from fire. A is not entitled to compensation from B, if the circumstances show that he intended to act gratuitously.

[60] For the right of set off to succeed, the person seeking to invoke this right must satisfy three conditions namely:

(a) a party was bound by law to pay money;

(b) that party did not pay and so the plaintiff paid it; and

(c) the plaintiff was interested in the payment of that money.

[61] The defendant, relying on Suffian FJ's (as he then was) judgment in the Federal Court case of *PR SP Periakaruppan Chettiar v Yong Book Fong* [1972] 1 MLJ 160 at p 161 contended that they have successfully make out a case of s 70 of the Contracts Act 1950, for the following reasons:

(a) that the plaintiff or the PGC was bound by law to pay off their respective debts of the PGC;

(b) that the plaintiff or the PGC did not pay their lawful debts and the defendant discharged the same; and

(c) that the defendant was interested in the payment of that money as independent contractor in managing the financial affairs of the PGC.

[62] In respect of the defendant's reliance on s 70 of the Contracts Act 1950 which the defendant sought to be invoked against the plaintiff, it is clear from the very provision itself, and the decision in *PR SP Periakauppan Chettiar*, that the plaintiff must first be under a legal obligation to pay or provide for the working capital of the subsidiaries. Having considered the facts and circumstances of the present appeal, we are of the considered view that this very component which is essential to the applicability of s 70, was not present. Therefore, reliance on s 70 may not be placed by the defendant for its claimed set off.

[63] As for s 71 of the Contracts Act 1950, the defendant relied on the Privy Council's decision in *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* [1967] 2 MLJ 118; [1967] 1 LNS 161 where Lord Upjohn stated in respect of s 70 of the Contracts Act 1950 as follows:

> That section is in terms identical with s 70 of the Indian Contract Act upon which there is some authority to which their Lordships will later briefly refer.
>
> It has been common ground before their Lordships that four conditions must be satisfied to establish a claim under s 71.
>
> The doing of the act or the delivery of the thing referred to in the section:
>
> (1) must be lawful;
>
> (2) must be done for another person;
>
> (3) must not be intended to be done gratuitously;
>
> (4) must be such that the other person enjoys the benefit of the act or the delivery.
>
> In their Lordships' judgment these matters must be answered at the time that the act is done or the thing delivered and this, their Lordships think, is of fundamental importance. In this case the relevant time was therefore the building of the roadway in April to December, 1961.

[64] We are of the considered view that that the following conditions are required for the successful application of s 71, to the facts of the present appeal, namely:

A (a) the doing of the act or delivery of the thing ie payment of debts of the PGC on behalf and for the benefit of the plaintiff, must be lawful;

(b) the payment of debts to the PGC must be done for another person ie for the PGC, for the benefit of the plaintiff and/or the Government;

B (c) the payment of debts to the PGC must not be intended to be done gratuitously; and

(d) the payment of debts to the PGC must be such that the other person ie plaintiff enjoys the benefit of the act or the delivery.

C

[65] The defendant contended that their expenditure of the said amount of set off was lawful and that at the material times, the said amount of set off was made, it benefited the plaintiff and/or the Government.

D **[66]** Further, the defendant contended that they utilised their own funds to pay the said amount of set off and that it would make no commercial sense for such expenditure or payments to be gratuitous. The said cl 5 of the third and fourth management agreements merely required that the defendant 'procure on behalf and for the benefit of the Group', such money as shall be necessary to E meet the working capital requirements of the Group, on a best endeavour basis. Thus, the defendant is not responsible to provide PGC with working capital. It was in this context that the equitable set off was invoked by the defendant.

F **[67]** In relation to s 71 of the Contracts Act 1950, whilst the payments provided by the defendant were lawful, we are of the considered view that the said amount of set off cannot be said to be monies provided for the benefit of the plaintiff. As stated earlier, the monies were actually provided for the use of the subsidiaries which are separate legal entities and are not the plaintiff. Thus, G if the defendant wishes to look for repayment of the said amount of set off, it would have to look to the subsidiaries and not the plaintiff. After all, the subsidiaries will became the subsidiaries of the defendant eventually.

[68] We are also of the view that there is no appealable error in the learned H judge's finding that the defendant could not rely on ss 70 and 71 of the CA to claim a set off.

[69] We find there is no appealable error in the learned High Court judge's finding of fact and in law that the defendant's right of set off was unsustainable I as the obligation to repay the working capital in the form of the said amount of set off was not stated in the third and fourth management agreements, thus any working capital provided was not meant to be repayable to the defendant. In this regard, we agree with the plaintiff's contention that the obligation to refund the working capital was only an arrangement between the defendant

and ECSB and specific to the period for the first and second management agreements whereas the defendant's obligation to provide the working capital was a contractual obligation under the third and fourth management agreements. The clause on the obligation to repay the working capital which was expressly stated in the first and second management agreements, was expressly removed in the third and fourth management agreements.

[70] Since the defendant did not plead any counterclaim against the plaintiff. Thus, even if the alleged set off fails as a defence, there was no question of the defendant recovering the RM191,300,000 that it had expended.

OUR CONCLUSION

[71] In reaching our conclusion, we were very much guided by the principles on appellate intervention as recently pronounced by the Federal Court in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1. In our view, the learned High Court judge's various findings mentioned above, were in our view, not plainly wrong.

[72] We are of the considered opinion that the learned High Court judge did not commit any appellable errors which warranted appellate intervention in the defendant's appeal. More often than not, an appellate court will not reverse a trial court's findings of facts unless that finding was 'plainly wrong'.

[73] In the light of our above findings, we are of the respectful view that there are no merits in the defendant's appeal and we unanimously dismissed the defendant's appeal with costs of RM20,000 subject to allocatur.

[74] The decision of the learned High Court judge of 25 June 2019 is affirmed.

Appeal dismissed with costs of RM20,000.

Reported by Nabilah Syahida Abdullah Salleh